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CASE CLIPS

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CRIMINAL LAW CASES

WALES v. STATE, No. 31A01-0107-CR-279, ___ N.E.2d ___ (Ind. Ct. App. May 28, 2002).
NAJAM, J.

"Opening the door" to evidence otherwise inadmissible is a well-recognized exception to the rules of evidence. See Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000) (otherwise inadmissible evidence may become admissible where the defendant "opens the door" to questioning on that evidence); see also MILLER § 609.202, 172 ("A defendant may 'open the door' to cross examination concerning convictions otherwise too old for use under Rule 609(b)."). We see no reason to penalize the State for failing to comply with Rule 609(b)'s notice requirement, the other procedural requirement imposed by the rule, when the defendant invites inquiries into his criminal past by opening the door to impeachment evidence. Therefore, because Wales opened the door by presenting a misleading view of his criminal past on direct examination, we conclude that the court did not abuse its discretion when it allowed the State to impeach Wales with evidence of his 1985 conviction even though the State had failed to provide notice under Rule 609(b).[3]

. . . .

[3] We apply this same analysis to Wales' argument that the trial court erred when it failed to engage on the record in the balancing required by Rule 609(b). Because Wales opened the door to evidence of his 1985 conviction, whether or not the trial court engaged in adequate balancing on the record is moot. See Scalassi, 759 N.E.2d at 624.

BAILEY and ROBB, JJ., concurred.

ALEXANDER v. STATE, No. 49A02-0105-CR-324, ___ N.E.2d ___ (Ind. Ct. App. May 30, 2002).
SULLIVAN, J.

[A]lexander maintains that there is a reasonable possibility that the trial court used the same evidentiary facts to establish that he carried a handgun without a license and to establish that he unlawfully possessed a firearm as a serious violent felon.

. . . .

[I]n Spivey [v. State, 761 N.E.2d 831 (Ind. 2002)], the Court found it necessary to clarify the Richardson [v. State, 717 N.E.2d 32 (Ind. 1999)] actual evidence test, stating that the actual evidence test "is *not* merely whether the evidentiary facts used to establish *one* of the essential elements of one offense may also have been used to establish *one* of the essential elements of a second challenged offense." 761 N.E.2d at 833 (emphasis in original). The Court further stated that there is no double jeopardy violation when the evidentiary facts establishing the essential elements of one offense also establish only one

or even several, *but not all*, of the essential elements of a second offense. [Citation omitted.] In other words, the court indicated that there will be a double jeopardy violation only where the evidentiary facts establishing *all* of the essential elements of one offense also establish *all* of the essential elements of a second challenged offense.

Notwithstanding the manner in which Spivey seems to phrase the Richardson actual evidence test, in application our Supreme Court has consistently overturned convictions upon double jeopardy grounds where the evidentiary facts establishing *an* essential element of one offense also establish *all* of the essential elements of the second challenged offense. Indeed, this is the import of the holding in Richardson itself.

. . . .

If we interpret Spivey to indicate that our Supreme Court intended to change the manner in which the Richardson actual evidence test is to be applied, one may observe that the Court's "new" phrasing of the Richardson actual evidence test may, in some situations, be nothing more than a repetition of the statutory elements test. We do not perceive that to be the Supreme Court's intent. Thus, we are faced with a dilemma — whether to follow the example set forth in the application of double jeopardy principles or follow the Supreme Court's phrasing of the Richardson/Spivey actual evidence test. It is our view that the former is the more reasonable course to follow.

. . . .

[W]e hold that Alexander has demonstrated that there is a reasonable possibility that the evidentiary facts used to establish an essential of his conviction for unlawful possession of a firearm by a serious violent felon, i.e. that he constructively possessed a firearm, were also used to establish that he possessed a handgun without a license. Therefore, we remand to the trial court with instructions to vacate Alexander's conviction and sentence for carrying a handgun without a license.

. . . .

KIRSCH and ROBB, JJ., concurred.

OWSLEY v. STATE, No. 49A04-0108-CR-340, ___ N.E.2d ___ (Ind. Ct. App. May 30, 2002).
BARNES, J.

[T]here is little explicit guidance in Indiana case law as to what will constitute "extremely contradictory and irreconcilable verdicts" that may necessitate "corrective action." Some cases hold that where the trial of one defendant results in acquittal upon some charges and convictions on others, the results ordinarily will survive a claim of inconsistency where the evidence is sufficient to support the convictions. [Citation omitted.] As former Chief Judge Ratliff noted some years ago, this proposition seems fundamentally incompatible with the notion that two verdicts on separate counts of an information could ever be inconsistent and would indicate that convictions are simply reviewed for the sufficiency of the evidence, not for consistency with acquittals on other charges. [Citation omitted.]

In practice, however, Indiana courts have routinely made an effort to ensure that opposing verdicts on different counts can be rationally reconciled. Judge Shields provided this test for analyzing whether verdicts are inconsistent:

> [D]eterminations are inconsistent only where they cannot be explained by weight and credibility assigned to the evidence. Thus, an acquittal on one count will not result in reversal of a conviction on a similar or related count, because the former will generally have at least one element (legal or factual) not required for the latter. In such an instance, the finder of fact will be presumed to have doubted the weight or credibility of the evidence presented in support of this distinguishing element.

[Citation omitted.] . . .

. . . .

In order to convict Owsley of conspiracy to commit dealing in cocaine as a Class B felony, the State was required to allege and prove that he agreed with Stallworth to commit dealing in cocaine in any amount with the intent to commit that crime and that either he or Stallworth performed an overt act in furtherance of the agreement. See Ind. Code § 35-41-5-2. The charging information alleged and the State at trial urged the jury to conclude that the overt act was Owsley's providing Stallworth with the rock cocaine that Stallworth sold to Campbell. In order to convict Owsley of possession of cocaine as a Class D felony, the State was required to allege and prove that he knowingly or intentionally possessed cocaine in any amount. [Citation omitted.]

At trial, the evidence presented in support of Owsley's possession of cocaine was precisely identical to that presented to support his commission of an overt act in furtherance of the alleged conspiracy: Campbell's contradicted testimony that he saw Owsley remove an object that Campbell could not see from his pants, make a snapping motion with his hand, place an object into Stallworth's hand, and that Stallworth then gave Campbell the cocaine from that same hand. There was no additional evidence either that Owsley possessed cocaine, or that he committed the overt act of providing Stallworth with the cocaine. . . .

The jury returned a verdict indicating the State failed to prove beyond a reasonable doubt that Owsley possessed cocaine. . . . It also returned a verdict indicating the State proved beyond a reasonable doubt that Owsley provided Stallworth with cocaine on October 24, 2000. This raises a concern that we cannot logically refute: if Owsley did not possess cocaine on that date, how could he have provided cocaine to Stallworth? We cannot explain the differing verdicts on the basis that the jury must have accepted some portions of the State's evidence and rejected other portions, because the evidence presented as to the possession charge and the overt act of the conspiracy was the same. . . .

The State posits that the jury essentially may have chosen to ignore the law and exercise lenity by convicting Owsley only of the conspiracy charge in spite of the evidence and the law, especially because it was revealed that Stallworth, Owsley's alleged co-conspirator, had only pled guilty to conspiracy to commit dealing in cocaine and had had his dealing in cocaine and possession charges dismissed. We acknowledge the likelihood that this is precisely what happened in this case. However, if we were to entertain suggestions that the jury must have engaged in nullification or exercised lenity in arriving at logically inconsistent verdicts, there could never be such a thing as fatally inconsistent verdicts because such an argument could always be raised.[4] . . .

Having decided that Owsley's conspiracy conviction is fatally inconsistent with his possession of cocaine acquittal, we must decide what "corrective action" to take because no Indiana case has ever reached the point of having to take such action. . . .

We conclude that the more appropriate course of action is to hold that Owsley is entitled to a new trial in this matter with respect to his conspiracy conviction. . . . Our vacation of Owsley's conspiracy conviction is on procedural grounds and should not be viewed as a holding that there was necessarily insufficient evidence to convict Owsley of that crime, in which event the prohibition against double jeopardy would bar Owsley's retrial on the conspiracy charge. [Citation omitted.]

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[4] In the federal system and the majority of other jurisdictions, which strictly adhere to the Dunn [v. United States, 284 U.S. 390, 52 S. Ct. 189 (1932)] rule, it is seen as beneficial that verdicts are not overturned for inconsistency precisely because that rule allows for leniency:

> The settled rule in the federal system is that it is the prerogative of the jury simultaneously to return inconsistent verdicts .... The present rule permits the jury to enter into compromises and to act out of leniency; if it were to be changed, the jury would have to be instructed that any inconsistencies in their verdicts would vitiate any guilty verdicts they might return, and the net result might be that fewer defendants would be acquitted on individual counts. And such an exception would be unwise.

[Citation omitted.] . . .

. . . Here, because of the jury's irreconcilable verdicts, it is impossible to determine definitively what was "necessarily decided" in the first trial, and the State is not collaterally estopped from relitigating whether Owsley committed the overt act of providing Stallworth with cocaine in furtherance of the alleged conspiracy. A jury's acquittal absolutely bars retrial on that particular charge, however, even if the verdict was reached erroneously. [Citations omitted.] Owsley, therefore, may only be retried on the conspiracy charge, but not on the possession or dealing charges. [Citation omitted.]

. . . .

FRIEDLANDER and VAIDIK, JJ., concurred.

MOORE v. STATE, No. 45A03-0108-CR-282, ___ N.E.2d ___ (Ind. Ct. App. June 4, 2002).
ROBB, J.

Moore contends that the trial court erred in denying his motion to dismiss the habitual offender charge because Article I, section 14 of the Indiana Constitution bars a retrial of the habitual offender charge when it was earlier reversed on the basis of insufficient evidence.

. . . .

[H]abitual offender proceedings remain, at their core, sentencing tools. As the United States Supreme Court noted in Monge [v. California, 524 U.S. 721 (1998)], "[w]here noncapital sentencing proceedings contain trial-like protections, that is a matter of legislative grace, not constitutional command." 524 U.S. at 734. Because an habitual offender determination is not an "offense" within the traditional understanding of the word, we hold that our double jeopardy clause does not apply to bar retrial of habitual offender proceedings even where the initial habitual offender determination is reversed due to insufficient evidence. Accordingly, the trial court did not err in denying Moore's motion to dismiss. The habitual offender determination is affirmed.

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BAILEY and NAJAM, JJ., concurred.

CIVIL LAW ISSUES

RAY-HAYES v. HEINAMANN, No. 89S05-0201-CV-306, ___ N.E.2d ___ (Ind. May 29, 2002).
BOEHM, J.

On January 2, 2002, this Court issued a per curiam decision resolving a conflict between the Court of Appeals' opinions in this case, Ray-Hayes v. Heinamann, 743 N.E.2d 777 (Ind. Ct. App. 2001) and Fort Wayne Int'l Airport v. Wilburn, 723 N.E.2d 967 (Ind. Ct. App. 2000), trans. denied. The two opinions disagreed over whether a civil action is timely commenced if a plaintiff files a complaint within the applicable statute of limitations period, but does not tender the summons to the clerk within that period. We held that under these circumstances the action is not timely and affirmed the trial court's dismissal of Sheila Ray-Hayes' claims against Nissan Motor Company, Ltd., Nissan North America, Inc., and Nissan Motor Corporation In U.S.A (collectively "Nissan"). Ray-Hayes v. Heinamann, 760 N.E.2d 172, 175 (Ind. 2002). On January 31, Ray-Hayes filed a petition for rehearing asking this Court to apply that decision only prospectively. For the reasons that follow, we grant her petition.

Petitions for rehearing are extremely rarely granted. [Citation omitted.] Ray-Hayes asks us to take another very unusual step and apply the decision in her case only prospectively. . . . In Bayh v. Sonnenburg, 573 N.E.2d 398, 406 (Ind. 1991), this Court followed the three-prong test employed by the United States Supreme Court to determine when to follow the unusual course of applying a decision prospectively. . . .

Ray-Hayes contends that our holding was a "radical departure from prior appellate decisions" and that, when she filed her complaint in September 1999, "it was generally understood among Indiana trial lawyers that the filing of a complaint tolled the statute of limitations." Nissan argues, as it did in its petition for transfer, that there was no departure from existing law, citing this Court's opinion in Boostrom v. Bach, 622 N.E.2d 175, 177 n.2 (Ind. 1993), which referred to the summons as one of those documents "necessary to commencement of a suit." In support of her petition for rehearing, Ray-Hayes calls to our attention a recent lecture presented by Professor William F. Harvey, author of a series of Indiana Practice treatises on the Indiana Rules of Procedure. In his prepared remarks, Professor Harvey wrote, "No attorney in his right mind would have superimposed Small Claims Rule 3 upon Trial Rule 3, whether after Boostrom in 1993, or Wilburn in 2000." Although this case and most others turn on Trial Rule 3, not Small Claims Rule 3, we take this claim to apply to both.

We do not agree with Ray-Hayes that Professor Harvey's remarks conclusively evidence a "common understanding" among Indiana attorneys that filing the summons was not necessary to toll the statute of limitations. Nor, in our experience, was there such a common understanding. Nevertheless, it is significant that Professor Harvey held this view and stated as much in his widely used treatise. See 1 William F. Harvey, Indiana Practice, § 3.3 at 74 (3d ed. 1999). Although Trial Rule 4(B) states that "[c]ontemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall furnish to the clerk as many copies of the complaint and summons as are necessary," the treatise tracked the following language of former Trial Rule 3 without qualification or reference to Rule 4: "When the plaintiff files the complaint with the clerk of the court, the action is commenced." [Citation omitted.] Several judges on the Court of Appeals shared the view that service of the summons was not needed to toll the statute of limitations, and it is regrettable that former Trial Rule 3 did not explicitly refer to the summons. Finally, this Court's mention of the summons in Boostrom came in a footnote. Under these circumstances, we think the resolution of this issue was arguably a surprise, at least to some. It was not "clearly foreshadowed."

The second Sonnenburg factor seems marginally relevant. As explained above, the issue of whether filing the summons is required to toll the statute of limitations was arguably unresolved when Ray-Hayes filed her complaint against Nissan. The recent amendments to Trial Rule 3, [footnote omitted] effective April 1, 2002, essentially do what Ray-Hayes contends was not done until our January 2 holding, and for the future this problem is resolved.

The third factor, however, warrants giving relief to Ray-Hayes. Dismissal of her complaint as a result of her understanding of the rule, which was shared by some respected authorities on Indiana law, is a particularly harsh result. [Citation omitted.] The offsetting unfairness is minimal unless a defendant can show detrimental reliance on the passage of time between filing the complaint and the service of summons. The rule of law we announced in this case did not create new substantive rights. Parties are entitled to rely on procedural rules, but in this case it appears there may have been no reliance. If so, the balance of inequity is tipped heavily in favor of prospective application.

We do not suggest that appellate court opinions concerning the proper operation of a trial rule are to be prospective frequently or even occasionally. Prospective application in this case is a product of its very specific circumstances: the diversity of opinion among legal experts as to the proper application of Trial Rule 3 when Ray-Hayes' complaint was filed, that retrospective application of our decision to Ray-Hayes' case will not further that holding's operation, the harsh result of dismissal, and the apparent lack of prejudice to the opposing parties from delay in the service of summonses.

We grant Ray-Hayes' petition for rehearing, vacate the trial court's dismissal of her action against Nissan for failure to tender summonses before the statute of limitations

expired, and remand for further proceedings, including an opportunity for the defendants to renew their motions to dismiss if they can establish a material detriment in the presentation of their case or otherwise occurring as a result of the delay in issuance of summons and notification to them that a claim had been asserted.

DICKSON and RUCKER, JJ., concurred.

SHEPARD, C. J., and SULLIVAN, J., dissented and would deny rehearing.

PENN-HARRIS-MADISON SCH. CORP. v. JOY, No. 71A04-0010-CV-437, ___ N.E.2d ___ (Ind. Ct. App. May 29, 2002).

VAIDIK, J.

Penn-Harris-Madison School Corporation (Penn) challenges the trial court's grant of summary judgment in favor of Tianna Joy, four other students, and two parents of Penn students (collectively, the Students), after the court found that Penn's drug testing program violated the Search and Seizure Clause—Article 1, Section 11 of the Indiana Constitution (Section 11). Because this case presents an issue of great public concern, we find the case is not moot despite the graduation of the students. With respect to the summary judgment, we find no reversible error in the court's findings, which Penn argues are based upon extra-judicial sources of information. However, given recent authority from our supreme court, we must conclude that Penn's program comports with Section 11, except for the testing of student drivers for nicotine. Thus, we reverse in part, affirm in part, and remand.

. . . .

Considering the totality of the circumstances, we are constrained to conclude that Policy 360, as it applies to participants in extracurricular activities, is sufficiently similar to the drug testing program examined in *Linke* to pass constitutional muster under Section 11. Applying *Linke* [*v. Northwestern Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002)], we further find that Section 11 does not proscribe the random suspicionless testing of student drivers for alcohol and other non-tobacco-related drugs.

Regarding nicotine testing of student drivers, however, the governmental interest does not justify the intrusion on the Students' liberty interests. We recognize that the additional intrusion may be minimal. However, under Policy 360 as amended, Penn receives information about a positive nicotine drug profile but, without any correlating benefit to the school district or to the student, its interest in that information is negligible. We find Policy 360 overly inclusive in that respect and, thus, unreasonable under Section 11. Accordingly, we reverse the grant of summary judgment in part, affirm in part, and remand for entry of summary judgment in conformance with this opinion.

. . . .

MATTINGLY-MAY and RILEY, JJ., concurred.

JUVENILE LAW ISSUE

BAKER v. MARION COUNTY OFFICE OF FAMILY AND SOC. SERV., No. 49A02-0105-JV-299, ___ N.E.2d ___ (Ind. Ct. App. May 30, 2002).

MATHIAS, J.

Mother and Father argue that attorney Strodtman's joint representation of them at their termination hearing created an impermissible conflict of interest. Whether a single attorney may represent both parents in a termination proceeding is a case of first impression in Indiana. . . .

. . . .

In the present case, the record shows that attorney Strodtman complied with the requirements of Rule 1.7(a) when he explained that Mother and Father did not have interests directly adverse to each other:

> THE COURT: . . . Mr. Strodtman, are you going to be representing both [Mother] and [Father]?
> MR. STRODTMAN: Yes, Your Honor. My opinion is that I don't have any hearing conflict in this matter. I've discussed the matter with both of the parties, and they agreed that I can represent them fairly. There's no situation here that we see where Mom or Dad would be blaming each other for the allegations that have been alleged by the Office of Family and Children. So, I think, in good faith I can go forward; and both parents have consented.

[Citation to Transcript omitted.]

Yet, Appellants claim that even an apparent conflict of interest in a termination proceeding should constitute reversible error. We disagree. We hold that conflict of interest claims in termination proceedings should be considered and resolved in the same manner as claims of ineffective assistance of counsel in criminal proceedings. Under that analysis, for an attorney's conflict of interest to constitute reversible error in a proceeding for the termination of parental rights, an allegedly aggrieved parent must show an actual conflict of interest that existed at the time of the proceeding in question. [Citation omitted.]

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BARNES and KIRSCH, JJ., concurred.

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